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No. 239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

RAMON FELICIANO, ET AL., *Petitioners,*

v.

UNITED STATES OF AMERICA, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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UNITED STATES OF AMERICA, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners, Ramon Feliciano et al., pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the First Circuit affirming a judgment of the United States District Court for the District of Puerto Rico denying to the petitioners the declaratory and injunctive relief they seek.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported. It is printed as Appendix A hereto. The opinion of the District Court is reported at 297 F. Supp. 1356, and is printed as Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals (Appendix C, *infra*) was entered on March 11, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1964).

QUESTIONS PRESENTED

1. Whether the Executive Branch has statutory authority to maintain, on the basis of an executive order issued during World War II, the seas surrounding an entire island inhabited by United States citizens as a defensive sea area from which all persons are excluded except as the military permits.

2. Whether the restrictions imposed by that executive order on those citizens, whose island is used by the United States Navy as a weapons range, deprive them of liberty or property without due process of law or take their property without providing just compensation.

STATUTE AND EXECUTIVE ORDER INVOLVED

The statutory provision directly involved is 18 U.S.C. § 2152 (1964). It provides in its most pertinent part:

> "Whoever knowingly, willfully, or wantonly violates any duly authorized and promulgated order or regulation of the President governing persons or vessels within the limits of defensive sea areas, which the President, for purposes of national defense, may from time to time establish by executive order—
>
> "Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Executive Order No. 8684 of February 14, 1941, 3 C.F.R. 895 (1943 Supp.), established the Culebra Island Naval Defense Sea Area and Naval Airspace Reservation, and provides as follows:

> "At no time shall any person, other than persons on public vessels of the United States, enter Culebra Island Naval Defensive Sea Area, nor shall any vessel or other craft, other than public vessels of the United States, be navigated into said area, unless authorized by the Secretary of the Navy.
>
> "At no time shall any aircraft, other than public aircraft of the United States, be navigated into Culebra Island Naval Airspace Reservation, unless authorized by the Secretary of the Navy."

The texts of section 2152 and of Executive Order No. 8684 are set forth in Appendix D hereto.

STATEMENT

Petitioners are residents of the island of Culebra, which is one of the 76 municipalities comprising the Commonwealth of Puerto Rico. Culebra has been an organized municipality since March 8, 1905. It has a population of approximately 1,200 civilians who are citizens of the United States. There is a local government, including an elected mayor and a municipal assembly. The residents are represented in the legislature of the Commonwealth.

The principal means of livelihood for the residents of Culebra are fishing and cattle raising. They depend on the surrounding seas for fishing and for transporting their cattle to the main island of Puerto Rico. In addition, they rely wholly on transportation by sea and air to receive food, machinery, and the myriad of prod-

ucts necessary for day-to-day civilized living. Lacking any local hospital or any educational institutions encompassing more than the primary grades, the residents of Culebra must travel frequently to and from the main island.

On February 14, 1941, the President of the United States signed Executive Order No. 8684, 3 C.F.R. 895 (1943 Supp.) (App. D, *infra*). This order created the "Culebra Island Naval Defensive Sea Area" and the "Culebra Island Naval Airspace Reservation," under color of authority of 18 U.S.C. § 96 (1940), *Recodified as,* 18 U.S.C. § 2152 (1964), and 49 U.S.C. § 174 (1940), *repealed,* Act of Aug. 23, 1958, Pub. L. 85-726, § 1401, 72 Stat. 806. By virtue of this order the island of Culebra was totally surrounded by a barrier comprising the entire "territorial waters between the extreme high-water mark and the three-mile marine boundary" of the island, as well as "the airspace over the said territorial waters and island." Entry into these zones without prior authorization of the military authorities was made subject to the penalties prescribed by the statutes under which the President acted—fines of up to $5,000 or imprisonment for up to five years, or both.

The Navy at once established a firing range within the Defensive Sea Area and set targets on the northwestern peninsula of Culebra, known as Punta Molino. This use of Culebra has borne even more heavily upon the island's residents over the ensuing years. As a result of increased firing exercises and the addition of new targets in 1968 (R. 24)* several incidents have

*"R." references are to the appendix before the Court of Appeals.

occurred involving civilians who have entered the proscribed zones. Anastacio Soto Ayala, the president of the Fishermen's Association of Culebra, which represents more than 40 Culebran families that depend on fishing for a living, has been warned by the Navy against entering and fishing within the proscribed zones. (R. 30, 31). This enforcement of Executive Order No. 8684 has caused significant economic hardship for Culebran fishermen. (R. 31).

In March and April 1968 meetings were called by Naval authorities at which representatives of the military issued warnings to residents of Culebra, to the effect that anyone entering the established zones without prior Navy approval would be considered in violation of the law and would be prosecuted. (R. 46).

Thereafter, petitioners filed a declaratory judgment suit in the District Court for the District of Puerto Rico (R. 2), seeking to have Executive Order No. 8684 declared invalid and to have the enforcement of the order enjoined. An evidentiary hearing was held, following which the District Court issued an order dismissing petitioners' complaint. The District Court ruled that 18 U.S.C. § 2152 gave the President authority to establish defensive sea areas in both wartime and peacetime, and that presidential discretion had not been abused by continuing Executive Order No. 8684 in effect. It further ruled that the enforcement of Executive Order No. 8684 did not constitute either a taking of petitioners' property without just compensation or an unconstitutional restriction of personal liberty.

While this decision was on appeal the Navy attempted to place additional pressure on petitioners. Again under color of Executive Order No. 8684 it attempted to control the use to be made by civilians of their private property in Culebra. In a letter* dated December 5, 1969, Rear Admiral A. R. Matter, Commander, Tenth Naval District, which includes the island of Culebra, stated to one of the petitioners regarding the Defensive Sea Area:

> "This large complex is expanding and operations are becoming increasingly intensive, frequently being conducted through seven days of the week. As such use increases, inhabitants of nearby areas such as your property will be subjected to the noise of supersonic booms, gunfire, rocket fire and heavy air traffic.
>
> "It is hoped that the foregoing discussion has conveyed a clear picture of the current Navy operations in and around Culebra. Under the circumstances, it would not be possible to authorize use by the public of any part of the Navy's shoreline strip in Culebra for access to beaches nor for the siting of boat docking facilities. Needless to say, the Navy would oppose any use of privately-owned lands in Culebra involving the beaches or otherwise conflicting with operational requirements."

On March 11, 1970, the Court of Appeals issued a brief per curiam opinion affirming the judgment of the District Court. (*See* Appendix A).

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* Following the decision of the District Court, this letter was admitted into the record by agreement of the parties and the Court of Appeals.

REASONS FOR GRANTING THE WRIT

This case presents basic issues concerning the extent to which civilian citizens of the United States may be subjected to control by military authorities in time of peace. Access to the sea and, through it, to the neighboring main island of their commonwealth is vital to the residents of Culebra. Such access as they now have is at the whim of the United States Navy. Under our system citizens are not meant to be dependent in this way on the discretion of military authorities for their vital necessities—certainly not in peacetime. Serious questions are thus raised (1) whether the statute under which the Navy claims authority thus to control Culebran life grants any such authority and, to the extent that the statute does grant that authority, (2) whether it is consistent with the provisions of the Constitution, particularly the Fifth Amendment. The questions are the more serious because the statute is general in its terms and has been invoked in many places other than Culebra.

1. The President has exercised the power granted by 18 U.S.C. § 2152 to declare defensive sea areas on 26 occasions. Several designations have been expressely revoked, including designations of principal mainland United States harbors made contemporaneously with the designation of Culebra during World War II.* Among the various remaining defensive sea areas, however, are Pearl Harbor (Exec. Order No. 8143 of May 26, 1939, 3 C.F.R. 504 (1943 Supp.)), Honolulu (Exec.

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* *E.g.*, Exec. Order No. 8683 of Feb. 14, 1941, 3 C.F.R. 894 (1943 Supp.) (islands of Rose, Tutuila, and Guam); Exec. Order No. 8953 of Nov. 27, 1943, 3 C.F.R. 1029 (1943 Supp.) (Los Angeles-Long Beach); Exec. Order No. 8970 of Dec. 11, 1941, 3 C.F.R. 1035 (1943 Supp.) (Boston, San Diego, San Francisco).

Order No. 8987 of Dec. 20, 1941, 3 C.F.R. 1048 (1943 Supp.)), Midway Island (Exec. Order No. 8682 of Feb. 14, 1941, 3 C.F.R. 894 (1943 Supp.), *as amended by* Exec. Order No. 8729 of April 2, 1941, 3 C.F.R. 919 (1943 Supp.) and Exec. Order No. 9881 of Aug. 4, 1947, 3 C.F.R. 662 (1948 Supp.)), and Kiska Island (Exec. Order No. 8680 of Feb 14, 1941, 3 C.F.R. 892 (1943 Supp.), *as amended by* Exec. Order No. 8729 of April 2, 1941, 3 C.F.R. 919 (1943 Supp.)). The issues raised by the existence and enforcement of defensive sea area orders against civilians in time of peace are of continuing importance and should be decided by this Court.

As originally enacted, the statute that eventually became 18 U.S.C. § 2152 merely prescribed criminal penalties for willful or malicious damage to harbor defenses and fortifications. Act of July 7, 1898, ch. 576, 30 Stat. 717. It conferred no regulatory power on the Executive at all. *See* 26 Op. Att'y Gen. 258 (1907). In 1907 the Attorney General of the United States, concerned not with the empowering of the President to regulate surface vessel passage but merely with preventing ships from anchoring in such a way as deliberately or accidentally to cut submarine cables, urged passage of amending legislation. *Id.* This resulted in an amendment passed in 1909. Act of March 4, 1909, ch. 321, § 44, 35 Stat. 1097.

In 1917 Congress was asked to grant the President additional powers. The precise scope of the powers sought was stated by the Secretary of the Navy in a letter to the Senate Committee on Naval Affairs. The Secretary proposed

> "that certain authority be requested from Congress to legalize the establishment and the control

and protection of harbor defenses and defensive sea areas which may become necessary *in time of actual or threatened war*.

"*Should hostilities be threatened of a maritime nature,* it will be necessary for the purposes of national defense to establish 'defensive sea areas' . . . ." S. Rep. No. 940, 64th Cong., 2d Sess. 1 (1917) (emphasis added).

The draft bill that accompanied this letter became law without any changes being made in the text as recommended by the Secretary of the Navy. Act of March 4, 1917, ch. 180, § 44, 39 Stat. 1194. It now forms the pertinent part of section 2152. The fact that the bill recommended by the Secretary became law without change, combined with the substance of the Secretary's letter just referred to—which constitutes the only significant legislative history in this regard—casts serious doubt on the Court of Appeals' conclusion that "Congress chose to confer a broader power on the President" than the power to establish defensive sea areas "in time of actual or threatened war." There is no persuasive evidence that Congress made any such choice. Section 2152 should be read to encompass no more than the power that was sought.

In promulgating the executive order now in question, the President stated that he was acting "for purposes of national defense." This was in the dark days of World War II, before the United States' formal entry into that war. There was then a state of national emergency which justified drastic measures such as the creation of the Culebra Island Defensive Sea Area; the Nation was "in time of actual or threatened war." *See* Presidential Proclamation No. 2352 of Sept. 8, 1939, 54 Stat. 2643. That national emergency, how-

ever, was ended by Presidential Proclamation No. 2974 of April 28, 1952, 66 Stat. c31. Yet there has been no reconsideration of the executive order, and the present restrictions on the residents of Culebra are being imposed by the Navy without justification of actual or threatened war. Executive Order No. 8684 is therefore invalid as exceeding the congressional delegation of power. *Kent* v. *Dulles*, 357 U.S. 116, 129 (1958). It has never been the law that a mere assertion by the President that national defense requirements call for certain action is sufficient to justify that action. *Cf. Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). No statute should be so construed as to make such an executive dictum conclusive, particularly not a statute that can have such far-reaching effects as section 2152.

2. Executive Order No. 8684 places the residents of Culebra in a legal "cocoon," the penetration of which is subject to the exclusive and unappealable discretion of the controlling military authorities. (R. 64). It calls to mind the orders that were involved in the Japanese internment cases of World War II, *Korematsu* v. *United States*, 323 U.S. 214 (1944), and *Hirabayashi* v. *United States*, 320 U.S. 81 (1943).

In discussing the *Korematsu* case some years after it was decided, this Court said:

> "[W]e allowed the Government in time of war to exclude citizens from their homes and restrict their freedom of movement only on a showing of 'the gravest imminent danger to the public safety'. There the Congress and the Chief Executive moved in coordination; and, as we have said, the Nation was then at war. No such condition presently exists." *Kent* v. *Dulles*, 357 U.S. 116, 128 (1958).

Likewise, no such showing is possible here, and the restriction of the Culebrans by the Navy therefore cannot be justified.

Culebrans are made to suffer unwarranted impairment of their precious right of movement, an aspect of liberty protected by the due process clause of the Fifth Amendment, and their property is taken without due process or just compensation. In *Kent* v. *Dulles,* which involved the question whether the Secretary of State had authority to issue regulations denying the issuance of passports to United States citizens who were members of the Communist Party, the Court held that the right to travel "across frontiers in either direction, *and inside frontiers as well*" was a right guaranteed by the Fifth Amendment of the Constitution. 357 U.S. at 126 (emphasis added). The Court reaffirmed the existence of this right in *Aptheker* v. *Secretary of State,* 378 U.S. 500 (1964), which struck down a congressional statute having much the same effect as the administrative regulations involved in *Kent,* and, like *Kent,* upheld the right of Communists to travel free of the kind of restriction sought to be imposed.

In the present case we are confronted with a situation that in many respects is of a more serious nature, and potentially more dangerous, *see NAACP* v. *Button,* 371 U.S. 415, 432-33 (1963), than the above-cited cases:

a. There is no imminent danger to public safety as the nation is not at war or under threat of war.

b. The civilian citizens are totally enveloped by an an all-encompassing legal barrier.

c. The military control is absolute; there is no consultation or appeal from the military mandate.

Furthermore, the Government has taken petitioners' property rights without compensating them. That there is a taking cannot be seriously disputed. Petitioners are lacking in full enjoyment of their property because of governmental action. *United States* v. *Causby*, 328 U.S. 256 (1946); *Portsmouth Harbor Land & Hotel Co.* v. *United States*, 260 U.S. 327 (1922). *See also Bydlon* v. *United States*, 175 F. Supp. 891 (Ct. Cl. 1959) (opinion of Whitaker, J., concurring in part and dissenting in part).

In the *Portsmouth Harbor* case the Court held that the firing of cannons from a government fort adjacent to plaintiffs' property constituted a "taking" of property that required the payment of compensation. Likewise, in *United States* v. *Causby, supra,* the Government had to compensate for a "taking" of property when low-level flights of government aircraft affected the operations of a chicken farm. The use of Culebra as a weapons range, in which use the Government finds the warrant for the continued enforcement of the defensive sea area order, is no different in principle.

It would be incongruous if the United States civilian citizens of Culebra were held not to be entitled to any remedy for the wrongs done them when others similarly injured have secured relief.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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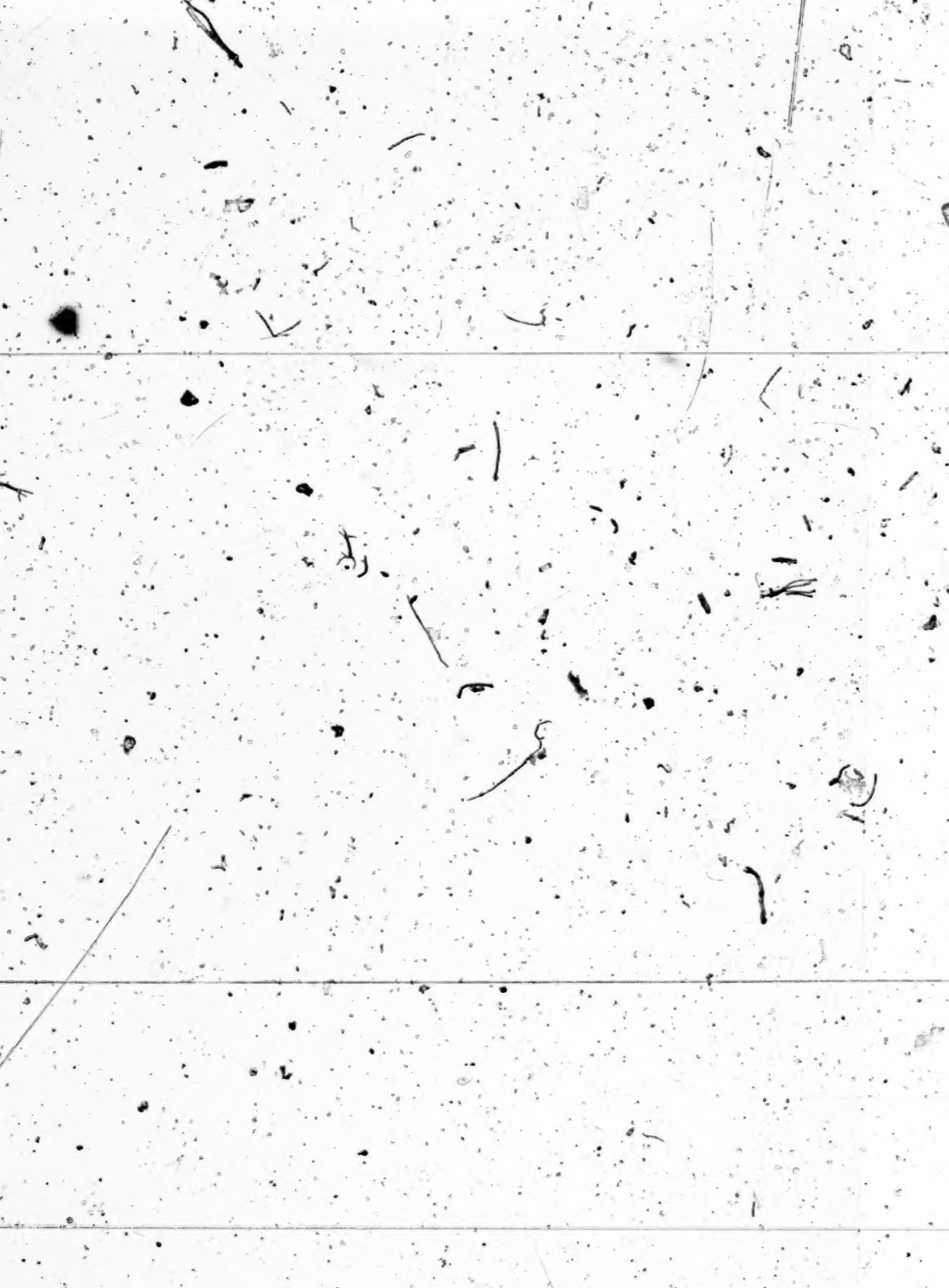

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7388

RAMON FELICIANO, ET AL.,
Plaintiffs, Appellants,

UNITED STATES OF AMERICA, ET AL.,
Defendants, Appellees.

Appeal from the United States District Court
for the District of Puerto Rico

Before ALDRICH, *Chief Judge,*
McENTEE and COFFIN, *Circuit Judges.*

Juan R. Torruella, with whom *Jose A. Suro* and *Alberto Pico* were on brief, for appellants.

Kevin T. Maroney, Attorney, Department of Justice, with whom *J. Walter Yeagley*, Assistant Attorney General, and *Walter A. Oleniewski*, Attorney, Department of Justice, were on brief, for appellees.

March 11, 1970.

PER CURIAM. For the reasons stated in the thoughtful opinion of the district court, 297 F. Supp. 1356 (D.P.R. 1969), we affirm the court's determination that the present use of the Culebra Island Naval Defensive Sea Area is

within the Congressional authorization and the discretion of the President, and that such use does not constitute a taking of plaintiff's property or freedom of movement without due process of law, the only issues raised by this appeal. We would add only a brief comment regarding the two arguments stressed on appeal.

First, appellant places great emphasis on a letter by the Secretary of the Navy to the Senate Committtee on Naval Affairs expressing the need for presidential power to create defensive sea areas "in time of actual or threatened war". S. Rep. No. 940, 64th Cong., 2d Sess. (1917). Appellant concludes from this single instance of pertinent legislative history that the President's power must be exercised in compliance with the standard expressed in the letter. However, it seems clear that Congress chose to confer a broader power on the President, who was empowered to create defensive sea areas when they were "necessary in his discretion for purposes of national defense". 18 U.S.C. § 96, recodified at 18 U.S.C. § 2152. Such statutory standard was satisfied here.

Secondly, concerning the alleged taking or improper restriction of plaintiff's right of travel, we note that such right may be inhibited, depending on "the extent of the government restriction imposed" and the "extent of the necessity for the restriction". *Zemel* v. *Rusk*, 381 U.S. 1, 14 (1965). Here there exist reasonable and frequent means of access to other islands, and the restrictions which do exist are reasonably necessary and—at least as presently administered—limited to such necessity.

Affirmed.

APPENDIX B

RAMON FELICIANO, on his behalf and on behalf of all others similarly situated,
Plaintiff,

v.

UNITED STATES, The President of the United States, and the Secretary of the Navy,
Defendants.

Civ. No. 388-68.
United States District Court
D. Puerto Rico.

March 31, 1969.

Jose A. Suro, San Juan, P. R., for plaintiff.

Charles E. Figueroa, Asst. U. S. Atty., San Juan, P. R., for defendants.

Memorandum and Order

CANCIO, Chief Judge.

Plaintiff has claimed, on behalf of himself and other residents of the Island of Culebra, Puerto Rico, that the defendants have illegally set up as a defensive sea area the waters out to the three-mile limit. He states that defendants control access to the Island and require all persons to obtain permission from them before entering the restricted area, in violation of the law and his constitutional rights. Defendants deny the control is illegal, allege that setting up of the defensive sea area is legal and entirely reasonable under the circumstances, and deny that their actions in any way constitute a taking of property belonging to plaintiff which would be compensable under the Fifth Amendment to the Constitution.

Plaintiff requested a temporary restraining order, which relief was denied by this Court after hearing the testimony of plaintiff and a number of other witnesses. Defendants have moved for dismissal of this action. After careful consideration of the testimony, all allegations, and the various memoranda filed herein, the Court has concluded that defendants' motion should be granted. The opinion will serve in place of findings of fact and conclusions of law.

Title 18 of the United States Code, Section 96, gave the President statutory authority to establish defensive sea areas in both war time and peace time, and the President has not abused his discretion in continuing in effect Executive Order No. 8684.

Executive Order No. 8684 designating the Culebra Island Naval Defensive Sea Area, was promulgated on February 14, 1941, pursuant to the authority given the President by 18 U.S.C. § 96. The pertinent language of that statute reads:

> * * * or shall knowingly, willfully, or wantonly violate and duly authorized and promulgated order or regulation of the President governing persons or vessels within the limits of defensive sea areas, which defensive areas are hereby authorized to be established by order of the President from time to time as may be necessary in his discretion for purposes of national defense, * * *

The power of the President of the United States to establish defensive sea areas and issue orders or regulations governing persons or vessels within their limits, given by 18 U.S.C. § 96 as shown above, continues unimpaired in 18 U.S.C. § 2152. Section 2152 provides for the punishment of violators of:

> any duly authorized and promulgated order or regulation of the President governing persons or vessels within the limits of defensive sea areas, which the

President, for purposes of national defense may from time to time establish by executive order.

Unlike former Section 96, the current provision specifies the use of executive orders in conjunction with exercise of the granted power.

The repeal of Section 96 was accomplished only as part of the revision, codification, and enactment into positive law of Title 18, United States Code. 25 June 1948, Ch. 645, 62 Stat. 683. All former Title 18 sections were repealed and either transferred to other titles or omitted. (Notes preceding 18 U.S.C. § 1; H.Rpt. 304, 80th Cong., 1st Sess. 1947, p. 9) Section 96 was incorporated as new Section 2152. [H.Rept. 304 *supra,* at A326 (incorporation of Act of March 4, 1917, Ch. 180, 39 Stat. 1194)] Strong congressional desire not to disturb existing law more than necessary was manifested throughout the revision. No inference of legislative construction was to be drawn from the placement of sections or catchlines. (62 Stat. 862) Rights and liabilities existing under repealed sections were not to be affected by the repeal. (Id.) It was noted that the hundreds of sections repealed included all laws incorporated in the revision. (H.Rept. 304 *supra,* at 9.) A ponderous schedule of repeals was prepared to "lift from the courts the onerous task of ferreting out implied repeals." (Id.) It is clear that no omission of the President's power to establish and regulate defensive sea areas was intended or accomplished.

It is also clear that Congress would have revoked the executive orders promulgated under Section 96 if it had intended or desired that result. Such action was well within Congress' power.

Even if Section 96 had been omitted, and the President's power to establish defensive sea areas abolished, previous executive orders issued under Section 96 would remain valid and in effect until such time as they were specifically revoked.

This may be seen from the underlying rationale in *United States* v. *Angcog*, 190 F.Supp. 696 at 699-700 (D.C.Guam 1961), which in an analogous situation held as follows:

> Since executive orders have the force and effect of statutes, *United States* v. *J. D. Streett & Co.*, D.C. E.D.Mo. 1957, 151 F.Supp. 469, 476 modified 8 Cir., 1958, 256 F.2d 557, rules of statutory construction will be applied to the executive order in question.
>
> The repeal of a law, by an implication arising from a subsequent one, is not favored. *Rosenberg* v. *United States*, 1953, 346 U.S. 273, 294, 73 S.Ct. 1152, 97 L.Ed. 1607.
>
> * * * A law is not to be construed as impliedly *repealing a prior law unless no other reasonable construction can be applied. United States* v. *Jackson*, 1938, 302 U.S. 628, 631, 58 S.Ct. 390, 392, 82 L.Ed. 488.
>
> 'Repeals by implication are to be avoided *if any other rational construction of the statute may retain the status quo of the existing law.' Birnie* v. *Permanente Metals Corp.*, 9 Cir. 1951, 192 F.2d 752, 754. [Emphasis added by the District Court of Guam.]

In *United States* v. *Angcog, supra*, the defendant was charged with unlawfully entering the Guam defensive sea area established by Executive Order No. 8683 (February 14, 1941, 6 F.R. 1015, promulgated simultaneously with Executive Order No. 8684) in violation of 18 U.S.C. § 2152. The Court rejected defendant's argument that Executive Order No. 8683 had been repealed by implication by the Organic Act of Guam (64 Stat. 384, 1950), reasoning that repeal by implication is not favored. Although in *Angcog, supra*, the Court did not specifically consider the effect of Section 2152 upon former Section 96, it did substitute Section 2152 for Section 96 in its reading of Executive Order No. 8683 and in reaching its holding that the executive order remained viable (Executive Order No. 8683

continued in effect until it was specifically revoked by Executive Order No. 11045, August 21, 1962, 27 F.R. 8511.)

If the recodification and revision of Title 18, United States Code, had resulted in the repeal of Executive Orders No. 8683 or 8684, then the Court in *Angcog* could not have substituted Section 2152 for Section 96 as mentioned above. Consequently, this Court holds that the revision and recodification of Title 18, United States Code, has not affected the validity of Executive Order No. 8684.

It is to be noted that the statute (18 U.S.C. § 96) did not limit the authority of the President to wartime or any other specified contingency. On the contrary, it gave the President discretion to decide when the national defense required a defensive sea area: "It is settled that to all administrative regulations purporting to be made under authority legally delegated there attaches a presumption of the existence of facts justifying the specific exercise." *Bailey* v. *Holland,* 126 F.2d 317, 322 (4 Cir. 1942), and cases cited therein. Far from refuting this presumption, the record gives ample evidence of the necessity of the Culebra Island Naval Defensive Sea Area, thus bolstering the presumption that the President has not abused his discretion in continuing in effect Executive Order No. 8684.

Historically, presidents have issued executive orders designating defensive sea areas pursuant to the authority of 18 U.S.C. § 96 and, later, 18 U.S.C. § 2152, in both war time and peace time. Some of those created in war time were repealed at the end of the war and others so created remained in effect during peace time. Some created in peace time remained in effect through alternate periods of peace and war which followed.

There has been no presidential revocation of Executive Order No. 8684; it is therefore concluded that Executive Order No. 8684, if constitutional, continues in full force and effect.

Title 48, Section 749 of the United States Code does not prevent the authority granted by 18 U.S.C. § 96 from applying to Puerto Rico.

Section 749 of 48 U.S.C. enacted on March 2, 1917, two days prior to that portion of 18 U.S.C. § 96 which gave the President authority to designate defensive sea areas reads today as follows:

> § 749. Harbors and navigable waters transferred.
>
> The harbor areas and navigable streams and bodies of water and submerged lands underlying the same in and around the Island of Puerto Rico and the adjacent islands and waters, owned by the United States on March 2, 1917, and not reserved by the United States for public purposes, are placed under the control of the government of Puerto Rico, to be administered in the same manner and subject to the same limitations as the property enumerated in Sections 747 and 748 of this Title. *All laws of the United States for the protection and improvement of the navigable waters of the United States and the preservation of the interests of navigation and commerce, except so far as may be locally inapplicable, shall apply to said island and waters and to its adjacent islands and waters.* Nothing in this chapter contained shall be construed so as to affect or impair in any manner the terms or conditions of any authorization, permits or other powers lawfully granted or exercised in or in respect of said waters and submerged lands in and surrounding said island and its adjacent islands by the Secretary of the Army or other authorized officer or agent of the United States prior to March 2, 1917. (Emphasis added. With insignificant changes, this section is substantially the same as when enacted.)

The 1917 version also contained a clause revoking a law empowering the Secretary of War to authorize construction of piers and other facilities on land underlying Puerto Rican waters.

Section 747, to which the above section 749 refers, provides that the property enumerated in it was placed under the control of the Government of Puerto Rico "to be administered for the benefit of the people of Puerto Rico; and the legislature of Puerto Rico shall have authority, subject to the limitations imposed on all its acts, to legislate with respect to all such matters as it may deem advisable."

Plaintiff argues that since Section 749 turns over the navigable waters to Puerto Rico, then in order to have a defensive sea area the United States "had to come to Puerto Rico and negotiate with the government as they did in 1902, regarding some lands for the naval base." To support this theory, Plaintiff argues that in 1900, Section 14 of the Foraker Act (now 49 U.S.C. § 746) turned over certain land to Puerto Rico. The Navy wanted some land on Culebra Island and was advised by the Attorney General that it would not be warranted in requesting the President to make an assignment of the land to it but that the *usual course* of obtaining a retrocession should be followed as the Government had made no reservation in the land surrender to Puerto Rico. The Government did, in fact, obtain a transfer of the lands from the Legislature of Puerto Rico.

To suggest that this procedure must be followed to obtain a defensive sea area is incorrect. This is not a case of the unauthorized taking of land by the President. It is a congressionally authorized regulation of navigable waters for the purpose of national defense. Congress clearly retained the power to make laws providing for defense, even if those laws apply to Puerto Rican or other waters; and when it passed 18 U.S.C. § 96, giving the President authority to designate defensive sea areas, that authority included Puerto Rico.

The retention of congressional power to legislate in regard to Puerto Rican waters is spelled out in the underlined language of 48 U.S.C. § 749, *supra*, "All laws of

the United States for the *protection* and improvement of the navigable waters of the United States and the preservation of the interests of navigation and commerce, except so far as may be locally inapplicable, shall apply to said island and waters and to its adjacent islands and waters." As the record discloses, defensive sea areas may serve the dual purpose of national defense and preservation of navigational interests by enabling the Navy to coordinate its exercises with the regulated coming and going of other ships, thus allowing the Navy to carry out its essential training without endangering other seas. Of course, the defensive areas envisoned by 18 U.S.C. § 96 may also serve to protect navigable waters.

However, even if the language of 48 U.S.C. § 749 is not found broad enough to encompass 18 U.S.C. § 96, 48 U.S.C. § 734 provides:

> The statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States * * *

This language must be construed as broad enough to encompass 18 U.S.C. § 96, which is by no means "locally inapplicable" within the meaning of 48 U.S.C. § 749 or 48 U.S.C. § 734. In discussing what constitutes a locally inapplicable statute under 48 U.S.C. § 749, the Court in *Guerrido* v. *Alcoa Steamship Co.*, 234 F.2d 349, 355 (1 Cir. 1956), stated:

> We conclude, therefore, that the rules of admiralty and maritime law of the United States are presently in force in the navigable waters of the United States in and around the island of Puerto Rico to the extent that they are not locally inapplicable either because they were not designed to apply to Puerto Rican waters or because they have been rendered inconsistent by Puerto Rican legislation. *This is not to say, of course,*

> *that Puerto Rican legislation could thus supplant a rule of maritime law which Congress in the exercise of its constitutional power has expressly made applicable to Puerto Rican waters.* (Emphasis added.)

Following the holding in *Guerrido, Fonseca* v. *Prann,* 282 F.2d 153, 156 (1 Cir. 1960) cert. den. 365 U.S. 860, 81 S.Ct. 826, 5 L.Ed.2d 822 (1961), held that the Jones Act (meaning the act regarding mariner's workmen's compensation, and not to be confused with the Organic Act of 1917, also called the Jones Act) was not inherently inapplicable to Puerto Rico, but, on the other hand, since there was nothing in the Jones Act making it specifically applicable to the territorial waters of Puerto Rico, Puerto Rico was free to enact workmen's compensation legislation inconsistent with the Jones Act. The Court was careful to point out that Congress could supplant such local legislation by making the Jones Act specifically applicable to Puerto Rican waters.

Thus, as regards general maritime law, these cases give Puerto Rico the limited power of making "locally inapplicable" a federal maritime statute not specifically applicable to Puerto Rico. Section 96 of 18 U.S.C. does not specifically mention Puerto Rico and, certainly, does not accept it from the operation of defensive sea areas. However, Plaintiff has not pointed out any Puerto Rican statute which purports to make 18 U.S.C. § 96 "locally inapplicable." Furthermore, even if he could find such a statute, it could not make 18 U.S.C. § 96 "locally inapplicable" for the reason that 18 U.S.C. §19 is geared to national defense, as distinguished from workmen's compensation. Congress might reasonably think that the local interests in providing for injured workmen and framing maritime rules might justify allowing Puerto Rico to enact maritime compensation statutes differing from the non-specific federal statutes, but, by its very nature, national defense cannot be regulated in at least by local government of Puerto Rico or any state.

Whereas in *Guerrido, supra*, the court was able to find some legislative intent by Congress that Puerto Rico be allowed to mold its own workmen's compensation laws for mariners, pointing out 234 F.2d at page 355 that, at about the same time Congress enacted 48 U.S.C. § 749 as a part of the Organic Act of 1917, it also sought to grant similar authority to the states to provide workmen's compensation for mariners,* there is no evidence that Congress intended for Puerto Rico to be able to legislate contrary to the most general statutes dealing with national defense as regards its waters.

The facts point to an opposite conclusion. For example, nowhere is Puerto Rico given any power to provide for defense other than the powers enjoyed by the states to have a national guard and similar local defense forces, with the Governor as commander-in-chief. "The aim of the Foraker Act and the Organic Act was to give Puerto Rico full power of local self-determination, with an autonomy similar to that of the states and incorporated territories." "The effect was to confer upon the territory many of the attributes of quasi-sovereignty possessed by the states—as for example immunity from suit without their consent." *Puerto Rico* v. *Shell Co., (P. R.) Limited, et al.* (1937), 302 U.S. 253, 261-262, 58 S.Ct. 167, 82 L.Ed. 235.

"So long as Puerto Rico retains a 'Commonwealth' status, it may be free in the management of its own local

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* *Knickerbocker Ice Co.* v. *Stewart* (1920), 253 U.S. 149, 40 S.Ct. 438, 64 L.Ed. 834, held the latter to be an unconstitutional delegation of congressional power to the states, but the Court of Appeals, First Circuit, deciding *Guerrido, supra*, 234 F.2d page 356, stated that "what Congress could not constitutionally delegate to the legislature of a state as the organ of an independent sovereignty, it might well be able to delegate to the legislature which it had created for a territory which it had organized." As authorities the Court cited four cases in footnote 22, page 356. In view of this it would appear that even the limited authority conferred on Puerto Rico by *Guerrido* is on the border of constitutionality.

affairs, but it does not have independent and separate existence," and "it is linked to the United States of America and hence is a part of its political system in a manner compatible with its Federal structure." Resolution 22, approved by the Constitutional Convention of Puerto Rico, February 4, 1952. Congress has the obligation under the Federal Constitution of providing for the common defense, *Gara* v. *United States*, 178 F.2d 38 (6 Cir. 1949), aff. 340 U.S. 857, 71 S.Ct. 87, 95 L.Ed. 628 (1950), and Puerto Rico being a part of the political system of the United States, and its people being United States citizens, this obligation to provide for the common defense extends to her. Since Congress has not agreed with Puerto Rico, by means of a compact or otherwise, to provide for its own defense, independent of United States national defense efforts, but has, for lack of an agreement, maintained Puerto Rico on a par with the states regarding defense, it cannot reasonably be maintained that Congress would intend that Puerto Rico be given the power to tailor to local tastes an Act of Congress which relates to national defense simply because the act applies generally to all the waters of the United States, without specifically designating Puerto Rico.

In fact, as long as Puerto Rico remains a part of the United States, it would probably be unconstitutional for Congress to allow Puerto Rico any say whatever over maritime regulations involving national defense. As was pointed out in footnote 1, *Knickerbocker Ice Co.* v. *Stewart*, *supra*, places the holding in *Guerrido*, enabling Puerto Rico to pass maritime workmen's compensation laws, inconsistent with those of the United States which do not specifically apply to Puerto Rico, at the constitutional border line. If this power is borderline, the power to alter this law relating to national defense does not exist. In *Alabama* v. *Texas, et al.* (1954), 347 U.S. 272, 74 S.Ct. 481, 98 L.Ed. 689, the constitutionality of the Submerged Lands Act of 1953, 67 Stat. 29, was challenged. That Act conveyed to

some of the states title to land under the ocean but retained United States control of "said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs * * *." The Supreme Court dismissed the complaint in a *per curiam* decision, stating that the power of Congress to dispose of any kind of property belonging to the United States is vested in Congress without limitation. Mr. Justice Reed, concurring, pointed to the above quoted retention of Federal power and explained at page 276, 74 S.Ct. at page 483 that "the cession challenged here does not affect the *power and responsibility of the United States as sovereign to foster and protect against foreign and domestic enemies* that area of resources ceded to the proprietorship of the respective states." (Emphasis added.) However, in spite of the broad retention of Federal powers, Justices Black and Douglas dissented. At page 278, 74 S.Ct. at page 484, Mr. Justice Black stated,

> In ocean water bordering our country, if nowhere else, day-to-day national power—complete, undivided, flexible, and immediately available is an essential attribute of federal sovereignty.

At page 282, 74 S.Ct. at page 486, Mr. Justice Douglas stated:

> Thus we are dealing here with incidents of national sovereignty. The marginal sea is not an oil well; it is more than a mass of water; it is a protective belt for the entire Nation over which the United States must exercise exclusive and paramount authority. The authority over it can no more be abdicated than any of the other great powers of the Federal Government.

Of the bench that decided *Alabama* v. *Texas*, only Justices Black and Douglas, who dissented, and Chief Justice Warren, who took no part in the consideration or decision of the case, now remain on the Supreme Court.

This Court therefore concludes that 48 U.S.C. § 749 in no way prevents the authority granted to the President by 18 U.S.C. § 96 (replaced by 18 U.S.C. § 2152), and any actions taken or orders promulgated in accordance with such authority, from applying to Puerto Rico.

The power to create defensive sea areas both in war time and peace time is constitutional, and the enforcement of Executive Order 8684 does not constitute either a taking of Plaintiff's property without compensation, in violation of the Fifth Amendment, or an unconstitutional restriction of personal liberty.

Congress has the obligation under the Federal Constitution of providing for the common defense. *Gara* v. *United States,* supra. Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine. *Berman* v. *Parker* (1954), 348 U.S. 26, 33, 75 S.Ct. 98, 99 L.Ed. 27. The basic power to legislate for national defense purposes being present, and given the power of choice of means, the pertinent questions become: (1) Did Congress overstep a constitutional limit in choosing, as a means, to authorize the President to designate defensive sea areas, and (2) Did the President overstep a constitutional limit in the manner he created the defensive sea area in question.

A case indicating a "no" answer to both of these questions is *Perko* v. *United States,* 204 F.2d 446, (8 Cir. 1953) cert. den. 346 U.S. 832, 74 S.Ct. 48, 98 L.Ed. 355 (1953). The facts in that case are that 49 U.S.C. § 174 (repealed by 72 Stat. 806) authorized the President to set up airspace reservations in the United States for national defense or other governmental purpose. Executive Order No. 10092 set up such an area to protect the wilderness character and aid in the administration of Superior National Forest. The defendants there owned resorts in the roadless area covered by the airban so they were prevented from entering by airplane, thus greatly curtailing the value of their

properties for resort purposes. The Court held that the statute was not unconstitutional as an unlawful delegation of power vested only in Congress, though, as construed, it gave the President authority to set apart an airspace reservation for any and every governmental purpose. Nor was it unconstitutional as a deprivation of property without due process of law or a taking of property for public use without just compensation. The rationale on the taking issue was simply that the defendants did not own the sky above their property, the United States having exclusive national sovereignty in the airspace above the United States. Likewise, in the case at bar, Plaintiff does not own the navigable waters around Culebra.

A case concerned with access to navigable waters is *United States* v. *Commodore Park* (1945), 324 U.S. 386, 65 S.Ct. 803, 89 L.Ed. 1017. There the Navy dredged a bay to make it suitable for the operation of seaplanes. This was done pursuant to the authority given the Navy by Congress to establish, develop and increase the naval aviation facilities of the base—48 Stat. 957; 53 Stat. 590-592; 53 Stat. 757, 772-773. The dredged material was deposited in Mason Creek, between the shores of Government-owned land, thus cutting off the remainder of Mason Creek, along which respondent's land bordered, from any navigable outlet to the bay and sea. The Supreme Court, agreeing in this regard with the Court of Appeals, held that the project was related to commerce and navigation. The Court stated at page 391, 65 S.Ct. at page 805:

> Whatever market value of riparian lands may be attributable to their closeness to navigable waters, does not detract from the government's "absolute" power, in the interests of commerce, to make necessary changes in a stream. In short, as against the demands of commerce, an owner of land adjacent to navigable waters, whose fast lands are left uninvaded, has no private riparian rights of access to the waters to do

> such things as "fishing and boating and the like", for which the government must pay.

The language above refers to the power to regulate navigable in the interest of commerce, rather than the defense power. However, as was said earlier, Executive Order No. 8684 serves the commerce-navigation purpose of coordinating the Navy's legitimate training program with the navigational ingress to and egress from Culebra. "The 'fact that purposes other than navigation will also be served could not invalidate the exercise of the authority conferred, even if those other purposes would not alone have justified an exercise of Congressional power.'" *United States* v. *Commodore Park*, supra, at 391-392, 65 S.Ct. at 806, quoting *Arizona* v. *California* (1931), 283 U.S. 423, 456, 51 S.Ct. 522, 75 L.Ed. 1154. Thus in *Commodore Park*, supra, the Navy acted pursuant to authority to create a base and as the Court of Appeals pointed out in its consideration of the case, 143 F.2d 720, 724 (4 Cir. 1944), rev. on other grounds.

> Although the deepening of the bay was incident to the enlargement of the Naval Base for national defense and the primary purpose to be served by the dredging was the accommodation of naval seaplanes and vessels, the project, nevertheless, related to commerce and navigation and was carried out in the exercise of the governmental power in this field.

In the case at bar the President is authorized to create defensive sea areas for purposes of national defense. Executive Order No. 8684 is primarily designed for this purpose. In addition, it also affects commerce and navigation and is an exercise of governmental power in the field.

However, even if Executive Order No. 8684 did not serve navigational purposes, what *Commodore Park*, supra, held relating to the dominance of the commerce power over riparian rights also applies to the defense power, especially

in view of *Perko*, supra, which held constitutional the power of the President to make airspace reservations for any governmental purpose without having to compensate the owners of isolated lands to which easy access is thus cut off.

In *Ex Parte Lincoln Seiichi Kanai*, 46 F.Supp. 286 (D.C. E.D.Wis. 1942), July 29, 1942, the Honorable Judge Duffy stated that:

> *Rights of the individual, under our federal Constitution and its amendments, are not absolute. When such rights come into conflict with other rights granted for the protection and safety and general welfare of the public, they must at times give way. There is no individual right so absolute that it may be exercised under any and all circumstances, and without any qualification.*

In Re Schroeder Hotel Co., 7 Cir., 86 F.2d 491, *Hitchman Coal & Coke Co.* v. *Mitchell et al.*, 245 U.S. 229, 38 S.Ct. 65, 62 L.Ed. 260, L.R.A.1918C, 497, Ann. Cas.1918B, 461. At the present time, the rights of our citizens to come and go as they please may be somewhat restricted by the necessity of protecting this nation from our enemies in time of war. The Constitution makes the President of the United States the commander in chief of our armed forces. Const. art. 2, § 2, cl. 1. The power to conduct war is placed by our Constitution in the President and in Congress. (Emphasis added.)

Moreover, there is here no wrongful infringement on Plaintiff's personal liberties. There is only a noncompensable burden on access to Culebra property similar to that placed on the parties in *Perko* and *Commodore*, supra, in the former by regulation and in the latter by physical blockage.

In this case, plaintiff and others similarly situated apparently have been regularly going out of and into the

Municipality of Culebra, without obtaining permission from defendants. Although Executive Order No. 8684 is in full force and effect; it has not been applied to the plaintiff and any other person similarly situated; and no prosecutions under Section 2152, U.S.C. Title 18, have been instituted. As a matter of fact, there is presently established a ferryboat service duly authorized by the defendants to transport daily cargo, freight and passengers to and from the Island of Culebra through a prearranged schedule and route without any interference from the naval authorities. Airplanes fly regularly to Culebra. Private boats and planes only have to ask permission in order to enter or leave, which permission has almost never been denied in the past, and never arbitrarily. Permission could be easily obtained daily from defendants for access to the island, and for the safety of plaintiffs it would certainly seem that this is a far from unreasonable requirement in light of the use of the area as a firing and testing range.

From the point of view of the Navy, they have stated that continuation of this Naval Defensive Sea Area and Naval Airspace Reservation is necessary to the accomplishment of the military mission of the United States, and that continued control over Culebra is necessary for the national defense. The Navy has continued to invest large amounts of money and effort in the Atlantic Fleet Weapon Range which includes the Vieques and Culebra complex and feels it is imperative to continue to develop this complex to the maximum practicable degree, so that, in time, virtually all of their advanced weapons training can be accomplished in this area.

The Navy has no other comparable training area in the Atlantic. The present Navy/Marine targets and training areas on, and adjacent to, Culebra and Vieques Islands have served well to train many Atlantic Fleet aircraft, ships, and landing force teams, but the present requirements make it urgent to preserve the ability of the Atlantic Fleet Weapons Range and associated target areas to sup-

port realistic fleet training. To do this, the Navy needs a target area free of restrictions, where training can be conducted that will exercise weapons and systems through their operational limits, and needs Culebra because:

1. It is essential to complete the Atlantic Fleet weapons range capability.

2. There is no other suitable place in the Atlantic area for a target complex for missiles and advanced weapons.

3. Without such a target complex, the operational readiness of Atlantic Fleet units will be seriously impaired.

4. Without continued naval control over civilian access and egress to the naval defensive sea area and naval air space reservation, the vital fleet training could not be conducted.

In short, the Government has selected the "least drastic means" of achieving the congressional objective of safeguarding the national security of the United States.—Compare *Aptheker* v. *Secretary of State* (1964), 378 U.S. 500, 512, 84 S.Ct. 1659, 12 L.Ed.2d 992. The Government has clearly not acted capriciously or arbitrarily in establishing the Culebra Island Defensive Sea Area. Cf. *United States* v. *Carmack* (1946), 329 U.S. 230, 243, 67 S.Ct. 252, 91 L.Ed. 209. On the contrary, in issuing Executive Order No. 8684, the President has apparently selected the least drastic means of reconciling defense and private needs. In any event, this Court cannot and will not, under these circumstances, substitute its judgment for that of the Executive branch in a matter of this nature.

For the foregoing reasons, it is ordered that defendants' motion be, and it is hereby, granted. The complaint in this action is hereby dismissed, with prejudice.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 7388

RAMON FELICIANO, ET AL.,
Plaintiffs, Appellants

v.

UNITED STATES OF AMERICA, ET AL.,
Defendants, Appellees

Judgment

Entered March 11, 1970

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged, and decreed as follows:

The judgment of the District Court is affirmed.

By the Court:

DANA H. GALLUP
Clerk.

APPENDIX D

Act of June 25, 1948, ch. 645, § 2152, 62 Stat. 799, 18 U.S.C. § 2152 (1964)

Fortifications, harbor defenses, or defensive sea areas

Whoever willfully trespasses upon, injures, or destroys any of the works or property or materials of any submarine mine or torpedo or fortification or harbor-defense system owned or constructed or in process of construction by the United States; or

Whoever willfully interferes with the operation or use of any such submarine mine, torpedo, fortification, or harbor-defense system; or

Whoever knowingly, willfully, or wantonly violates any duly authorized and promulgated order or regulation of the President governing persons or vessels within the limits of defensive sea areas, which the President, for purposes of national defense, may from time to time establish by executive order—

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

EXECUTIVE ORDER 8684

ESTABLISHING CULEBRA ISLAND NAVAL DEFENSE SEA AREA AND CULEBRA ISLAND NAVAL AIRSPACE RESERVATION

PUERTO RICO

By virtue of the Authority vested in me by the provisions of section 44 of the Criminal Code, as amended (U.S.C., title 18, sec. 96), and section 4 of the Air Commerce Act approved May 20, 1926 (44 Stat. 570, U.S.C., title 49, sec. 174), the territorial waters between the extreme high-water mark and the three-mile marine boundary surrounding the island of Culebra, Puerto Rico, are hereby established and reserved as a naval defensive sea area for purposes of national defense, such area to be

known as "Culebra Island Naval Defensive Sea Area"; and the airspace over the said territorial waters and island is hereby set apart and reserved as a naval airspace reservation for purposes of national defense, such reservation to be known as "Culebra Island Naval Airspace Reservation."

At no time shall any person, other than persons on public vessels of the United States, enter Culebra Island Naval Defensive Sea Area, nor shall any vessel or other craft, other than public vessels of the United States, be navigated into said area, unless authorized by the Secretary of the Navy.

At no time shall any aircraft, other than public aircraft of the United States, be navigated into Culebra Island Naval Airspace Reservation, unless authorized by the Secretary of the Navy.

The provisions of the preceding paragraph shall be enforced by the Secretary of the Navy, with the cooperation of the local law enforcement officers of the United States and of the Government of Puerto Rico, and the Secretary of the Navy is hereby authorized to prescribe such regulations as may be necessary to carry out such provisions.

Any person violating any of the provisions of this order relating to Culebra Island Naval Defensive Area shall be subject to the penalties provided by section 44 of the Criminal Code as amended (U.S.C., title 18, sec. 96), and any person violating any of the provisions of this order relating to Culebra Island Naval Airspace Reservation shall be subject to the penalties prescribed by the Civil Aeronautics Act of 1938 (52 Stat. 973).

This order shall take effect ninety days after date hereof.

(s) FRANKLIN D. ROOSEVELT

THE WHITE HOUSE,

February 14, 1941.